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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1577

JAMES H. WILLIAMS,

Petitioner,

v.

W. GRAHAM CLAYTOR, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner James H. Williams prays that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") which upheld a decision of the United States District Court for the District of Columbia ("District Court") that the petitioner's case should be dismissed for failure to prosecute.

OPINION BELOW

The opinion and order of the District Court, and the judgment and order of the Court of Appeals are set out in the Appendix to this petition for a writ of certiorari at pages 26 through 32.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the District Court erred by dismissing the petitioner's case for failure to prosecute.

RULES INVOLVED

Rule 41(b), F.R. Civ. P., provides in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

Rule 1-14 of the rules of the District Court provides:

> A dismissal for failure to prosecute may be ordered by the court upon motion by an adverse party, or upon the court's own motion. An order dismissing a claim for failure to prosecute shall specify that the dismissal is without prejudice, unless the court determines that the delay in prosecution of the claim has resulted in prejudice to an opposing party.

Rule 1-15(c) of the District Court provides, in pertinent part:

> Unless otherwise ordered by the court, . . . counsel who will conduct the trial shall appear at the pretrial conference. If counsel for a party fails to appear for the pretrial conference, the action may be disposed of by the court as in the case of nonappearance for trial.

STATEMENT OF FACTS

Petitioner James H. Williams is a black male citizen of the United States employed as a GS-14, Electrical Engineer, and as Director, Power Systems Division, of the Facilities Directorate, Naval Telecommunications Command, Department of the Navy (hereinafter "the agency")(R#5).[1] Mr. Williams has been an employee of the Department of the Navy since 1960, when he entered the Naval Facilities Engineering Command (NAVFAC) as a GS-5 Electrical Engineer. Petitioner was employed by NAVFAC from 1960 to 1966 by which time he had attained the GS-13 level. In 1966 petitioner was hired as a GS-13 Electrical Engineer by the Naval Telecommunications Command, Facilities Directorate. In 1968 he was promoted to GS-14 Supervisory Electrical Engineer and placed in charge of the agency's Electrical Power Unit (R. #5). Between September, 1968, and October, 1974, three successive agency Commanders assigned petitioner to be a Counselor in the agency's Equal Employment Opportunity (EEO) Program. Between July, 1972, and July, 1974, petitioner served as chairman of the agency's Equal Employment Opportunity Committee (R. #5).

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[1] At the time this suit was filed, appellant was Special Assistant for Power Systems to the Director of the Facilities Directorate. Citations to "R." and "App." refer to the record and joint appendix before the Court of Appeals.

In May, 1972, petitioner timely consulted an EEO Counselor as required by applicable regulations,[2] alleging that agency management discriminated against him because of his race by denying him the opportunity to perform the duties of his position and by denying him adequate staff as reprisal for his involvement in the agency EEO program (R. #5).

In November, 1972, petitioner timely appealed to the Department of the Navy from the classification of his position as GS-14, contending that the position should have been classified as GS-15. The Department of the Navy and, later, the U.S. Civil Service Commission both denied petitioner's appeal (R. #5).

In December 1973, during an inspection of the agency by the Deputy Inspector General of the Navy, Mr. Williams complained of both discriminatory and inequitable staffing of his unit and the improper definition and delineation of his duties and responsibilities. Throughout 1973 and 1974, he repeatedly brought to his supervisor's attention the fact that the performance of his duties was adversely affected by inadequate staffing and that he had been subjected to inequitable workloads. Mr. Williams further pointed out to his supervisors that their claim was questionable that funds and personnel allocations were not available to staff his unit adequately, in view of the agency's hiring new personnel for comparable units elsewhere within the Directorate and agency (R. #5).

In response to these requests, petitioner's immediate supervisor promised to provide additional staffing for appellant's unit. Such additional staffing was never provided, and, further, such staffing was specifically disapproved by higher authority in the agency (R. #5).

On March 12, 1974, Mr. Williams timely filed a formal complaint of discrimination: he alleged that, by reason of

[2] 5 C.F.R. §713.213.

his race, his supervisors had refused to staff his unit while increasing the staffing in other units; they refused to support the upward reclassification of his position; they subjected him to harassment as a result of his Equal Employment Opportunity work; and they threatened to abolish his position (R. #5). This formal complaint was filed without the assistance of counsel.

In May and June, 1974, an investigator from the Civil Service Commission conducted a complete investigation of petitioner's complaint; on July 18, 1974, the investigator submitted a report to the agency's Equal Employment Opportunity Officer (R. #9). On September 30, the agency Commander reviewed the Civil Service Commission investigator's report and found that although "there was no firm basis for upholding your allegation of racial discrimination" the investigator's report still revealed "a number of poor management practices and decisions." (R. #5, #9).

The agency Commander proposed to settle Mr. Williams' complaint (R. #5, #9).[3] On October 15, petitioner accepted the Commander's proposed disposition, subject to its satisfactory implementation (R. #9). On October 31, the Department of the Navy issued its final decision, which incorporated the proposed disposition (R. #9).

However, the new Commander of the agency refused to implement the agency's final decision (R. #5). On November 15, petitioner timely appealed to the Civil Service Commission because the agency had failed to implement the final decision (R. #5). On December 17, 1974, the agency Commander issued a decision rescinding the Department of the Navy final decision (R. #9).

On February 21, 1975, the Commission's Appeals Review Board vacated the agency's final decision and

[3] See 5 C.F.R. §713.217.

remanded it to the agency for further attempts at informal adjustment. The Board construed Mr. Williams' letter as a request to reinstate his complaint for further processing, and held that petitioner's complaint should, therefore, be re-processed from the point where the regulations require an attempt at informal adjustment (R. #5, #9).

The agency issued a second proposed disposition. On March 24, petitioner advised the agency Commander that the proposal was unacceptable, and requested a hearing by a CSC complaints examiner (R. #5, #9). A hearing was held before a Civil Service Commission complaints examiner on June 30 and July 1, 2, 7, 8, and 9, 1975 (R. #9). The complaints examiner found that, although the record was replete with charges and countercharges, the evidence failed to support either petitioner's or respondent's allegations:

> As I have stated above, management in this case has acted or failed to act in the past in ways which adversely affected Mr. Williams' employment. However, the key question in this case, as in any discrimination complaint case, is whether these actions or failures to act were motivated by discrimination prohibited by law. . . . I find that his race was not a factor in the operational problems which have occurred in the Command and which may have adversely affected him . . .
>
> . . . There is testimony in the record regarding complainant's activities in the area of EEO in the Command, and there is evidence that his superiors were concerned with the amount of official time he spent on EEO matters. The record also reveals that the Command's statistics with regard to minority hiring are less than desirable.
>
> (R. #9, Findings and Recommended Decision of EEO Complaints Examiner, p. 5)

Mr. Williams received the final agency decision on January 30, 1976, and timely filed the instant action *pro se* in the U.S. District Court on February 27, 1976 (R. #1, #5). The case was assigned to District Judge Gerhard Gesell. Respondent's answer was due on April 27, and was untimely filed April 30 by David Schlee, Assistant U.S. Attorney, who entered an appearance as the agency's counsel (R. #3). On May 21, Lawrence Speiser entered his appearance as attorney for petitioner and moved to amend the complaint (R. #4). Respondent did not oppose amendment; Judge Gesell granted the motion to amend, and, on May 25, the amended complaint was filed (R. #5). On June 7, Robert N. Ford, Chief of the Civil Division, Office of the United States Attorney, wrote Mr. Williams' counsel (App. p. 11):

> Dear Larry:
>
> Pursuant to your telephone conversation of June 4, 1976 with Assistant United States Attorney David R. Schlee of this office, we have prepared and filed with the court today a stipulation that defendant's answer . . . *shall be due on or before June 25, 1976* . . . .
>
> Bob
>
> [Emphasis added]

The stipulation was approved by Judge Gesell and filed on June 9, 1976 (R. #6).

On June 25, Robert N. Ford wrote a similar letter to petitioner's counsel stating "defendant's answer . . .shall be due on or before July 2, 1976." (App. p. 12). The stipulation was again approved by Judge Gesell and filed on June 29 (R. #7). Respondent's answer was filed six

days late on July 8, with Judge Gesell's handwritten notation, "Let this be Filed. Court reserves right to impose penalties for late filing." (R. #8).

Judge Gesell held a status conference in July, 1976, at which counsel for both sides agreed to file and respond to written discovery requests within ninety days (R. #8).

On October 12, a second attorney, Katherine Gruenheck, entered an appearance for the respondent (R. #11).

On October 19, Judge Gesell held a second status conference (App. p. 13). At that conference, Mr. Speiser requested permission to withdraw as counsel for petitioner to proceed unrepresented because of the factual complexity of the case (App. p. 14), although he would allow Mr. Williams time to retain other counsel (App. p. 15). Mr. Speiser, however, agreed to continue as petitioner's attorney (App. p. 17).

At the October 19 conference Judge Gesell ordered a status conference for October 29, so that counsel for both sides could agree on a deposition schedule (App. p. 21). Judge Gesell further denied both sides' requests to file interrogatories because the ninety-day deadline had already passed (App. p. 19):

> MR. SPEISER: . . . But I would, Your Honor, like to again request the Court to permit us to file interrogatories; and we would be willing to file them by the end of the week.
>
> THE COURT: When this complaint was filed, you started out saying that this case be assigned for hearing at the earliest practical date and that it be in every way expedited, as provided by the statute.
>
> Now here we are in October with a complaint that was filed in February. It should have been tried by now, since there has been such an elaborate

> administrative record. What I am concerned with is that you are unable to tell me anything about the case or the theory of the case or anything. . . .
>
> MS. GRUENHECK: Your Honor, my name is Katherine Gruenheck; and I am employed by the Department of Justice. Recently the case was transferred to me from Mr. David Schlee.
>
> I have nearly completed reading the entire record at this time but I will need at least another week to determine what type of discovery we need.
>
> THE COURT: You are out on interrogatories, too.
>
> MS. GRUENHECK: Your Honor, I did not understand there was this period for interrogatories.
>
> THE COURT: You should have understood it. That is what was agreed.
>
> THE COURT: I find this very distressing. This man filed his complaint on the 27th of February. It was answered in April. I had a status conference in May, immediately after it was answered. Mr. Speiser didn't appear; so we set it down again.
>
> Then the Plaintiff asked to amend the complaint; and the complaint was amended without opposition from the Government. Then the Defendants wanted more time to answer; and it was given to them. Then more time was stipulated.
>
> Then after the time was given, the Government filed late, failed to meet the date after two extensions; and we had another status conference. The parties told me they needed ninety days for interrogatories.
>
> I looked at the jacket today and not a single thing has been done on either side. This status conference was set with a view to setting this matter for trial. I am not going to change on that. There isn't any

other way that the Court can proceed except to proceed in accordance with some kind of regularity. I think counsel for both sides are at fault.

On November 4, an order of Judge Gesell was filed which dismissed one defendant, struck one claim for relief, and directed that "discovery proceed energetically" (R. #12). Another status conference was scheduled for December 14, 1976 (R. #12).

On November 8, respondent noted petitioner's deposition and requested petitioner to produce an extensive list of documents (R. #14). The agency deposed Mr. Williams on November 16, when counsel for Mr. Williams stated that he had instructed Mr. Williams "not to attempt to produce documents because the request is an attempt to evade the court order which barred any further interrogatories." (App. p. 25). On November 22, the agency moved to compel production of the documents requested in its first Notice of Deposition (App. p. 28), and noted Mr. Williams' deposition a second time (App. p. 28). Petitioner opposed and moved to quash (App. p. 43). On December 2, Judge Gesell granted Mr. Williams' motion to quash and denied the agency's motion to compel (App. p. 42).

On December 6, respondent noted the deposition of petitioner's wife, Lucila E. Gonzales Williams, who was manager of a retail store named "What's Happening," owned by petitioner (R. #18, #19). On December 9, Mr. Williams moved to quash and for a protective order (App. p. 43). On December 14, the agency noted the deposition of petitioner's former secretary, Dora Brotherton (R. #22), and petitioner moved to quash. A hearing was held on these motions before Judge Gesell on December 16 (App. p. 52). At that time, Judge Gesell cancelled the previously scheduled status conference, denied Mr. Williams' pending motions to quash,[4] and

[4] Both depositions were held on December 21, 1976.

reopened all discovery (App. p. 55). Judge Gesell further ordered that all discovery be completed by March 31, 1977 (App. p. 63).

On January 12, 1977, the agency filed its first interrogatories and request for production of documents (R. #29).

On February 4, Mr. Speiser filed a motion to withdraw as counsel for Mr. Williams (App. p. 66). Judge Gesell granted the motion on February 7 (App. p. 75). Judge Gesell's order also stated again that all discovery was to be completed by March 31, 1977, and scheduled a status call for April, 1977.

On February 18, Mr. Williams responded *pro se* to the agency's interrogatories and requests for production of documents (R. #32, #33), and filed amendments on March 1, 1977 (R. #45). On February 26, petitioner *pro se* filed his own interrogatories, requests for production of documents, and requests for admissions (R. #34, #35).

On March 1, the agency filed its second interrogatories (R. #36). On March 24, the agency moved for an enlargement of time to answer Mr. Williams' first interrogatories (R. #39), and again noted petitioner's deposition (R. #38).[5] On March 27, Judge Gesell granted the agency's motion for an enlargement of time as follows (App. p. 76):

> Upon consideration of the defendant's Motion to Enlarge Time . . . and the plaintiff's response thereto . . . defendant shall have until April 18, 1977 to file his responses, (sic)[6] to plaintiff's First set of interrogatories.

[5] Petitioner *pro se* moved to quash on March 25, 1977 (R. #40).

[6] Struck out with initials "GAG".

Mr. Williams timely filed an opposition to the agency's motion for enlargement of time on March 28 (R. #42). This opposition was filed *pro se*.

On March 25, a third attorney, Peter Lowenberg, entered his appearance as counsel for the agency (R. #44). On March 28, the agency responded to Mr. Williams' requests for admission (R. #43).

On April 4, the agency filed its objection to Mr. Williams' first set of interrogatories (R. #40) and on April 6, moved to compel discovery to its own interrogatories (R. #49, App. p. 77).

On April 7, Judge Harry T. Alexander entered his appearance as counsel for petitioner at a status call held before Judge Gesell (R. #50, App. p. 90). At that status conference, both sides agreed to file memoranda with the Court which would define the issues, list documents to be presented, and list witnesses to be called at trial. The Court set a deadline of April 25 for Mr. Williams and May 9, 1977, for the agency. Judge Gesell also scheduled a status conference for May 12 at 4 pm (App. p. 97)

> . . .to narrow the issues and to determine what documentary or other discovery may be required. . .
> (App. p. 97)

An order to this effect was filed on April 14 (App. p. 101).

On April 25, Judge Alexander moved for an extension of time to May 9, to file the memorandum which was due on that day (App. p. 102). The agency opposed the extension on April 29 (R. #54). Judge Gesell granted petitioner's motion on May 5, with the notation that "no further extensions will be allowed" (App. p. 102). No order was entered as to when the agency was to file its memorandum. On May 9, Judge Alexander timely served his memorandum by first-class mail in compliance with the April 14 order (R. #64). The Court received it on or about May 10, 1977, and the agency's attorney received it on May 11, 1977.

Judge Gesell held a status call on May 12, 1977, at 4 pm; Mr. Williams' attorney failed to appear (App. p. 122). Judge Gesell requested the agency's attorney to move "to dismiss for lack of prosecution." (App. p. 125) The agency's counsel so moved, and Judge Gesell granted the oral motion (App. p. 126); on May 13, a signed order was entered to that effect (App. p. 104).

On May 18, Mr. Williams, through his attorney, filed his opposition to the agency's motion to dismiss (App. p. 107), and moved for reconsideration of the dismissal for failure to prosecute (App. p. 110). On May 19, the agency opposed petitioner's motions (App. p. 112). On May 20, Mr. Williams filed a further motion an "Affidavit of Plaintiff to Accompany Motion to Reconsider Judgment and Order Dismissing Complaint" (App. p. 166). The agency filed its opposition on May 27 (App. p. 118). On June 7, Mr. Williams' motion for reconsideration was denied (App. p. 127).

On June 14, 1977, Mr. Williams *pro se* timely filed a notice of appeal from the judgment and order in favor of the agency entered on May 16 (R. #63).

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The jurisdiction of the District Court was founded upon section 717(c) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. sec. 2000e-16(c).

REASONS FOR GRANTING THE WRIT

The Supreme Court should accept this case for a determination of the proper response of a Federal Court to dereliction by counsel but not by his client. The facts of this case call for this Court to exercise its supervisory authority over conduct of attorneys in the Federal

courts, and to determine the proper response of the trial court which is faced with a diligent petitioner, but dilatory counsel.

A. When the Counsel for the Petitioner Are Responsible for Dilatory Actions, but the Petitioner Himself Is Diligent in Moving His Case Forward, the Petitioner's Case Should Not Be Dismissed for Failure to Prosecute.

The petitioner labored long and hard to follow the administrative process necessary to bring his case to trial, only to find the results of his efforts destroyed by two successive attorneys. Several key facts stand out in this record: the petitioner himself successfully conducted the administrative proceedings and timely filed *pro se* in District Court; the period of inaction in petitioner's case is virtually identical to the period in which he was represented by counsel; despite repeated demands by the District Court to petitioner's counsel, petitioner was forced to file his first discovery requests *pro se;* and when petitioner again retained counsel for the purpose of preparing his case for trial, counsel failed in this duty. These facts say that although petitioner may have been unwise in his choice of counsel, he was not dilatory in his prosecution of the case.

Petitioner, as a layman, was justified in assuming that his counsel would at least meet the bare procedural minimums necessary to keep his case in court. Although a layman is not entitled to an assurance of victory in court, he is entitled to an assurance that his case will not be lost for highly technical reasons which are unrelated to the merits. Petitioner submits that the proper course of conduct for the District Court when faced by dilatory counsel is *not* to punish the petitioner, when there is no indication that the petitioner himself is at fault.

The question presented here has been in controversy for some time. Chief Justice Warren Burger, as Circuit Judge, first expressed his doubts about the competence of American trial counsel as early as 1967. *See,* Burger, J., "A Sick Profession," 27 Fed. Bar J. 228 (Summer, 1967). In that article, then Circuit Judge Burger lamented the decline of the trial bar, focusing primarily on courtroom manners. Justice Burger observed that the legal profession had a very low standing in relation to comparable professions, and that the misconduct of trial attorneys was once cause for such an image. 27 Fed. Bar. J. at 228.

The controversy continues. Chief Justice Burger raised the identical issue in February, 1978, before the American Bar Association. *See,* "Lawscope," 64 A.B.A. J. 313 (1978). The essential question has remained unresolved over the course of eleven years.

The petitioner asks only that when a Federal district court is faced with counsel's misconduct, that the Court not punish the petitioner only to leave counsel untouched. The real problem which the court faces, attorney misconduct, is avoided, and the true purpose of the court, to decide the merits of controversies, is defeated.

The record reveals no instance whatsoever of dilatory tactics by the petitioner personally. The petitioner handled the administrative case himself, and carried the proceedings from the initial visit with an EEO Counselor through an administrative hearing through the final agency decision. There is a provision under the EEO regulations of the U.S. Civil Service Commission for dismissal for failure to prosecute. 5 C.F.R. §713.220(b). However, there is no suggestion on this record that this provision was ever considered by the agency or the Commission, despite the fact that the full administrative process ran from May, 1972, to February, 1976.

Further, the petitioner managed to successfully file his complaint in District Court and did so *pro se.* After this point, Mr. Williams' troubles began. They began when he retained counsel. His counsel filed no discovery requests for the full length of his employment from May, 1976, to February, 1977. It was during this period that the impatience of the District Court began and gradually increased over time. The primary controversy involved the discovery deadlines.

When discovery was finally filed on Mr. Williams' behalf, he filed it himself, after his attorney withdrew.

As the law stands now, there is no effective remedy for the derelictions of petitioner's attorney. The two alternatives offer the District Court nothing more than dismissal with prejudice, against the petitioner, on the one hand, and prejudice to the respondent, on the other. Among the lesser sanctions which the District Court should have considered is sanction against the attorney himself. This sanction is the only one which will directly cure the problem; the alternative sanctions injure the parties themselves, and defeat the primary purpose of the Federal courts.

The Court of Appeals here and in other circuits have consistently held that when the petitioner himself is an innocent party, there should be no dismissal for failure to prosecute.

The contrast lies within the District of Columbia itself. *Compare, Bibeau v. Northeast Airlines, Inc.,* 139 U.S. App.D.C. 28, 429 F.2d 212 (1970), *with Sheaffer v. Warehouse Employees Union, Local No. 730,* 132 U.S. App.D.C. 401, 408 F.2d 204, *cert. den.,* 395 U.S. 934 (1969). In *Bibeau,* the court specifically found that the parties themselves had not caused the delay; in *Sheaffer,* there was no finding of the party's responsibility one way

or the other. The dismissal in *Bibeau* was reversed and that in *Shaeffer* was not.

The Court of Appeals in the instant case failed to address the responsibility of Mr. Williams for the actions of his counsel. The actions which the Court of Appeals specifically addresses involve actions of petitioner's counsel *only.* Specifically, the Court of Appeals notes an agreement in open court at a status call which the petitioner did not attend (App. pp. 90-100 (April 7, 1977)). The Court of Appeals further noted that petitioner's counsel failed to timely file the pretrial statement; there is no suggestion anywhere on this record that Mr. Williams was somehow connected with this failure (App. p. 122-126). Finally, there was the failure of petitioner's counsel to attend a status call (App. p. 122-126). Again, the record shows no connection between action or inaction by petitioner and his counsel's failure to appear.

The circuit courts consistently refer to the necessity of the district courts to maintain a clear calendar, whether the trial court's decision is affirmed or reversed. *Bibeau, supra,* 429 F.2d at 213. Further, this Court has held that the injured petitioner's recourse is against the dilatory attorney for malpractice. *Link v. Wabash R.R. Co.,* 370 U.S. 626, 633-34 (1962). Petitioner here submits that the District Court should consider lesser sanctions first, including sanctions directly against counsel, before the petitioner is denied any opportunity to prove his case.

B. A Plaintiff under Title VII of the Civil Rights Act of 1964 Whose Case Has Been Dismissed Cannot Subsequently Be Made Whole by a Collateral Malpractice Suit against His Trial Attorney, and thus a District Court Should Consider Lesser Sanctions prior to Dismissal.

The dismissal of a suit under Title VII of the Civil Rights Act of 1964, whether with or without prejudice, effectively bars litigation on the merits. *Pond v. Braniff Airways, Inc.*, 453 F.2d 347 (5th Cir. 1972). With the dismissal of his suit, the plaintiff is forever barred from obtaining the true relief he seeks, as a malpractice action cannot afford the plaintiff the injunctive relief necessary to correct discriminatory employment practices. This question, whether the specialized relief under Title VII requires greater care in dismissing for failure to prosecute, is an important question under the Federal Rules of Civil Procedure which the Supreme Court should settle. Rule 19(b), Supreme Court Rules.

The statute of limitations under Title VII is extremely brief. A case must be filed in district court within thirty days of final agency action. Sec. 717(c); 42 U.S.C. sec. 2000e-16(c); *Vina v. Hub Electric Co.*, 480 F.2d 1139, 1141 (7th Cir. 1973). The initial administrative complaint must be filed within thirty days of the act of discrimination, and this requirement has been held to be jurisdictional. 5 C.F.R. §713.214(a)(1)(i); *Stockton v. Harris*, 434 F.Supp. 276, 278-79 (D.D.C. 1977); *Ettinger v. Johnson*, 518 F.2d 648 (3d Cir. 1975), on remand 410 F.Supp. 519 (E.D.Pa. 1976). This short statute of limitations virtually guarantees that if the case has been in district court long enough for dismissal to be considered, then the statute has long since expired.

The situation of the Title VII petitioner has been accurately analyzed by the Fifth Circuit. *Pond v. Braniff Airways, supra.* The *Pond* court opened its opinion with the observation, "The effect of the dismissal . . . was to bar litigation of the merits of the case because the time for filing of Pond's suit under Title VII had expired." 453 F.2d at 348.

Later, the Fifth Circuit wrote:

> The dismissal of Mrs. Pond's complaint was fatally prejudicial notwithstanding the recitation by the court to the contrary. We do not doubt the district court's power to dismiss with prejudice for failure to prosecute or to comply with court orders, either pursuant to the Federal Rules of Civil Procedure, or *sua sponte,* in the exercise of the inherent power of federal courts to control their dockets. Link v. Wabash R. Co., 1962, 370 U.S. 626, 629-30; Flaksa v. Little River Marine Construction Co., 5 Cir. 1968, 389 F.2d 885, 887 *cert. denied,* 392 U.S. 928; Fed. Rules Civ. Proc. 42(b). But such a dismissal must be within the sound discretion of the court. Our review is to determine the abuse *vel non* of the court's discretion. Brown v. Thompson, 5 Cir. 1970, 430 F.2d 1214, 1216; Flaksa v. Little River Marine Construction Co., *supra.*
>
> A dismissal with prejudice is a drastic sanction which may affect substantial rights of the litigant and is to be used only in extreme situations, Flaksa v. Little River Marine Construction Co., *supra,* 389 F.2d at 887, where there is "a clear record of delay or contumacious conduct by the plaintiff," Durham v. Florida East Coast Railway Co., 5 Cir. 1967, 385 F.2d 366, and where lesser sanctions would not serve the best interests of justice. Brown v. Thompson, *supra.* We do not find these extreme circumstances in this case. Pond was not a partici-

pant in the fault, and the conduct of counsel was no more than inadvertence. This is not to say that the trial court may not impose such lesser sanctions as it may find appropriate against counsel, see Woodham v. American Cystoscope Co., 5 Cir. 1964, 335 F.2d 551.

453 F.2d at 349

In the *Woodham* decision, cited in the quote above, the Fifth Circuit favorably cited a law review commentary which stated that "when the attorney is clearly at fault, the unoffending party should not suffer." 335 F.2d at 557, n. 15, quoting Comment, Sanctions at Pre-Trial Stages, 72 Yale L.J. 819, 830 (1963). This principle is the one most appropriately applied to proceedings brought under Title VII.

After dismissal, it is impossible for the plaintiff to obtain adequate relief by filing against his trial attorney. There is a difference in quality between suits under Title VII and other types of litigation. In the case of a suit upon a contract or a personal injury, the dismissed plaintiff may well obtain similar and sufficient monetary relief by a malpractice action. However, in the case of actions under Title VII, the plaintiff often seeks a workplace free of discrimination by various types of injunctive relief. For example, the petitioner here sought equitable relief in order to be free from harassment in his government position as Equal Employment Opportunity Counselor.

It is true that many complaints of job discrimination involve a claim of back pay; the loss of this monetary relief may be minimized by a successful malpractice suit against the attorney. However, the recovery of back pay is of much less value to the aggrieved employee if the discriminatory practices of the employer

remain the same as when the suit was filed. The relief which will actually change the employee's working conditions is clearly no longer available, and the plaintiff is functionally in no better position than when he started.

The malpractice suit against an attorney cannot give the aggrieved employee retroactive union seniority. *International Brotherhood of Teamsters v. United States*, ____ U.S. ____, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). A malpractice suit cannot eliminate tests and examinations which disproportionately exclude members of a protected class. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 849 (1971). The mere fact that suits under Title VII are in equity offers the court a much broader discretion in fashioning a remedy to eliminate the offensive employment practice.

Thus, the Supreme Court's rationale in *Link v. Wabash R.R. Co.*, 370 U.S. 629 (1962), should be revised to deal with the specialized situation under Title VII. In *Link* the Supreme Court held that the innocent plaintiff's remedy is a malpractice suit. 370 U.S. at 634, n. 10. However, the suit in *Link* dealt with a personal injury, where an award of monetary damages is the injured person's remedy. The loss of access to this remedy can indeed be compensated by a malpractice suit.

In the instant case, the petitioner complained of management practices which rendered him unable to fulfill his responsibilities as an Equal Employment Opportunity Counselor. The petitioner seeks specific injunctive relief in addition to his claim for back pay. Therefore, a malpractice action is totally useless to this petitioner in terms of rectifying the dismissal of his

case. A malpractice suit may result in recovery of any retainers or fees paid, but, of course, such a successful suit would only leave the petitioner in the same place where he started; it could not even begin to free him of the agency harassment of which he complains.

CONCLUSION

For the reasons stated in this Petition, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

[FILED
May 16 1977
James F. Davey, Clerk]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. WILLIAMS *Plaintiff,* *v.* W. GRAHAM CLAYTOR, JR. *Defendant.*	)	Civil Action No. 76-0333

JUDGMENT AND ORDER

Upon consideration of the Motion to Dismiss the Complaint for Failure to Prosecute, pursuant to the Court's inherent power, and pursuant to Rule 41(b), Fed. R. Civ. P., and Rules 1-15(c) of the Local Rules of Court, made orally by defendant's counsel on May 12, 1977, it appears to the Court, after reviewing the procedural history of this case, and being fully advised in the premises, that the plaintiff and his attorneys have engaged in repeated dilatory conduct prejudicial to the defendant consisting of, *inter alia,* the following examples:

(1) There have been three changes in the representation of plaintiff since this suit was instituted on February 27, 1976, including two periods when the plaintiff represented himself;

(2) Plaintiff failed to initiate any discovery for over one year from the filing of his Complaint;

(3) The only discovery sought by the plaintiff was filed approximately 30 days before the close of all discovery, a date set months in advance by Order of this Court;

(4) Plaintiff and his attorneys have made repeated attempts to thwart and delay all of the defendant's discovery efforts;

(5) Defendant's counsel provided the plaintiff with ample time to answer Interrogatories. Despite the provision of extra time, the plaintiff failed or refused to answer Interrogatories fully. Defendant filed a Motion to Compel Discovery. The Court denied this Motion on condition that the plaintiff include the information requested in the plaintiff's pre-trial statement;

(6) At a pre-trial conference held on April 7, 1977, plaintiff and his counsel agreed to follow a pre-trial Schedule which called for the filing of plaintiff's pre-trial statement on April 25, 1977, and a pre-trial conference on May 12, 1977. An order signed on April 19, 1977, embodied this agreed upon pre-trial schedule. Nevertheless, on April 25, 1977, plaintiff's counsel requested two additional weeks to file the plaintiff's pre-trial statement. The Court granted this request, with no further extensions, over defendant's objection, allowing plaintiff to file his pre-trial statement by May 9, 1977;

(7) Despite the grant of additional time to the plaintiff, plaintiff's pre-trial statement was not filed by May 9, 1977;

(8) Plaintiff's counsel has been on notice that all delays at this stage are extremely prejudicial to the defendant, Secretary of the Navy, because many of the defendant's witnesses are scheduled for transfer out of this jurisdiction and in some cases to assignments outside the continental United States at the end of May 1977;

(9) Despite repeated notice to the plaintiff's counsel of the correct mailing address for the defendant's counsel for purposes of service, the plaintiff has repeatedly failed or refused to properly serve counsel for the defendant with, among other things, plaintiff's pre-trial statement, thus causing further delay and further prejudice to the defendant; and

(10) After proper notice from the Court to both plaintiff and his counsel, neither plaintiff nor his counsel appeared at a scheduled pre-trial conference held on May 12, 1977.

And, it further appearing to the Court that the plaintiff himself was fully aware of all of the dilatory conduct described above, it is, therefore,

ORDERED that the defendant's Motion to Dismiss be and the same hereby is granted and the plaintiff's Complaint is hereby dismissed with prejudice.

/s/ Gerhard A. Gesell
United States District Judge

DATED: 5/13/77

[FILED
Jun 8, 1977
James F. Davey, Clerk]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. WILLIAMS,
Plaintiff,
v.
W. GRAHAM CLAYTOR, JR.,
Defendant.

Civil Action No. 76-0333

ORDER

Upon consideration of plaintiff's motion for reconsideration and the various papers filed in support thereof and in opposition thereto, it is hereby

ORDERED that on the basis of full and careful review of the entire record herein the plaintiff's motion for reconsideration is denied.

/s/ Gerhard A. Gesell
United States District Judge

June 7, 1977

[NOT TO BE PUBLISHED – SEE LOCAL RULE 8(f)]

[FILED
Apr 4 1978
George A. Fisher, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1642
James H. Williams, Appellant

v.

W. Graham Claytor, Jr., Secretary of the Navy, et al

September Term, 1977
Civil 76-0333

Appeal from the United States District Court
for the District of Columbia.

Before: SWYGERT,* United States Circuit Judge for the Seventh Circuit, and LEVENTHAL and ROBB, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion,

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Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

*Sitting by designation pursuant to 28 U.S.C. §291(a).

they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment---------- of the District Court appealed from in this case is hereby affirmed for the reasons set forth in the attached memorandum.

Per Curiam
For the Court
/s/George A. Fisher
George A. Fisher
Clerk

No. 77-1642—Williams v. Claytor

MEMORANDUM

There was a failure to comply with the timetable set in the District Court's order of April 14,* which memorialized the agreement reached in open court on April 7. This can not be viewed in isolation, for it was the culmination of prior incidents. Taking into account all the circumstances, we cannot say the District Judge abused his discretion in dismissing for lack of prosecution.

Affirmed.

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*There was not only a failure to attend the May 12 status conference (as to which there was some contention of reasonable misunderstanding) but also a failure to make proper filing by May 9 of the pre-hearing statement that would provide the witness list and the clarification of plaintiff's contentions long sought by the Secretary.